Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting Efficient Use of Spectrum Through	)	WT Docket No. 00-230
Elimination of Barriers to the Development of	)	
Secondary Markets	)	

REPLY COMMENTS OF
CTIA – THE WIRELESS ASSOCIATION™

CTIA – The Wireless Association™ ("CTIA") hereby replies to the initial comments filed in response to the Commission's *Second Further Notice of Proposed Rulemaking* ("*Second FNPRM*") in the above-captioned proceeding.[1] In its initial comments, CTIA commended the Commission for its continuing commitment to market-oriented policies that provide new and innovative options to put spectrum into use. In the instant comments, CTIA urges the Commission to reject an unlawful and unwise "spectrum grab" and reiterates the need to adopt means of ensuring interference protection in a private commons environment.

I. The Commission Should Reject the Proposal to Create a New Licensing Scheme in Violation of Section 309(j)

Under the guise of modifying the private commons model, Gateway Communications, Inc. ("Gateway") proposes that the Commission adopt an entirely new licensing scheme that would grant licenses exclusively to equipment manufacturers. In particular, Gateway proposes

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[1] The Commission adopted the *Second FNPRM* concurrently with a *Second Report and Order* and *Order on Reconsideration* in WT Docket No. 00-230. *See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004)("*Second Report and Order*" and "*Second FNPRM*," respectively).

that the Commission grant "private commons manager" licenses to equipment manufacturers in markets where, for example, a licensee has returned spectrum to the Commission or an auction has resulted in no winning bidder, in exchange for a one-time payment to the U.S. Treasury or a spectrum use.[2] The Commission should summarily reject Gateway's proposal as (1) far outside the scope of the *Second FNPRM*, and (2) contrary to Section 309(j)'s requirement that such spectrum be subject to competitive bidding.

As an initial matter, the Commission adopted the "private commons" model in the *Second Report and Order* to "allow licensees and spectrum lessees to make spectrum available to individual users or groups of users" through advanced technologies outside traditional subscriber-based service and network infrastructure arrangements.[3] The *Second FNRPM* seeks comment "on additional ways in which licensees and spectrum lessees may enter into arrangements in which other users may employ advanced technologies to opportunistically use licensed spectrum . . . *within the framework of the Commission's rules*."[4] It does not seek to find new ways to give an interested party an initial spectrum license to be used for private commons. Gateway's proposal thus goes well beyond the scope of the narrowly-focused *Second FNPRM*. Gateway would have the Commission act outside its existing rules – indeed, outside the scope of its enabling statute – and under no circumstances could Gateway's recommended action constitute a "logical outgrowth" of the *Second FNPRM* in accordance with the APA.[5]

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[2] *See* Comments of Gateway Communications, Inc., WT Docket No. 00-230, at 1 (filed Jan. 18, 2005)("Gateway Comments").

[3] *Second Report and Order*, 19 FCC Rcd at 17549.

[4] *Second FNPRM*, 19 FCC Rcd at 17575 (emphasis added).

[5] *See Sprint Corporation v. FCC*, 315 F.3d 369, 375-376 (D.C. Cir. 2003) (describing "logical outgrowth" test).

In any event, Gateway's proposed licensing scheme runs afoul of the Communications Act. Section 309(j)(1) of the Act requires the Commission to grant licenses "through a system of competitive bidding" when mutually exclusive applications for initial licenses are filed, unless certain specific statutory exemptions apply.[6] The Commission has previously observed that Congress provided the Commission with expanded auction authority "'to ensure that scarce spectrum is put to its highest and best use.'"[7] While Section 309(j)(2) lists enumerated exemptions to the auction requirement, equipment manufacturers seeking to operate private commons are not among them.[8] With respect to Section 309(j)(6)(E), the D.C. Circuit has observed that the provision "imposes an obligation only to minimize mutual exclusivity 'in the public interest' and 'within the framework of existing policies.'"[9] In this case, Gateway attempts to bypass the existing framework by asserting that "the transaction costs associated with more traditional spectrum licensing and leasing arrangements may be too high for any single niche user to justify entering into … leased access to the licensed spectrum they need."[10] Given the early stage of the secondary markets leasing regime, it is premature to argue that spectrum leasing is a failure and that the public interest demands a new licensing dynamic. This proposal is less about private commons and more about a spectrum grab.

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6 47 U.S.C. § 309(j)(1).

7 *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, *Third Notice of Proposed Rulemaking*, 19 FCC Rcd 8232, 8237 n.29 (*quoting* H.R. Conf. Rep. No. 105-217, 143 Cong. Rec. H6173 (daily ed. July 29, 1997)).

8 *See* 47 U.S.C. § 309(j)(2).

9 *Benkelman Telephone Co., et al. v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000) (citations omitted) (*citing DIRECTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997).

10 Gateway Comments at 3.

II. The Commission Should Clarify Ways to Ensure Interference Protection to Licensees that Are Not a Party to a Private Commons Arrangement

As CTIA noted in its initial comments, the private commons model provides opportunities for secondary market arrangements that take advantage of new technologies such as peer-to-peer operations. The Commission, however, must adopt policies to ensure that such devices "cannot be used outside the licensed spectrum and geographic area of the licensee that authorized use of its spectrum."[11] CTIA's concern is simple: users may move peer-to-peer devices operated under the private commons model into adjacent markets and operate them on non-participating licensees' exclusive use spectrum. Even if users operate the devices in accordance with the technical limits set forth in the secondary markets arrangement, the operations may cause harmful interference to the non-participating licensee's network. Without adequate protections, there will be no way to prohibit or track such rogue operations.

Cingular Wireless recognizes the potential for a private commons user to operate a device "outside the authorized geographic area and cause[] harmful interference to an adjacent licensee,"[12] and suggests that technical rules to "shut down" private commons model devices causing harmful interference may be "beneficial" and "necessary" at some point.[13] CTIA believes it would be prudent for the Commission to clarify that some controls are necessary before private commons arrangements are implemented to ensure that a private commons device is restricted from operating outside the geographic area covered by the secondary market arrangement.

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[11] Comments of CTIA – The Wireless Association™, WT Docket No. 00-230, at 4 (filed Jan. 18, 2005).

[12] Comments of Cingular Wireless LLC, WT Docket No. 00-230, at 4 (filed Jan. 18, 2005).

[13] *Id.* at 5.

In addition to the need to consider controls on private commons devices themselves, the *Secondary Markets* proceeding also addressed licensee and lessee responsibility for compliance with Commission policies and rules in the secondary markets context. In the *Second Report and Order*, the Commission affirmed its earlier decision that spectrum lessees in the *de facto* transfer context are "primarily and directly responsible" for ensuring compliance with FCC rules and policies. The Commission, however, also reiterated its conclusion that licensees could be potentially accountable in certain limited circumstances.[14] The Commission stated that such accountability "would only attach to ongoing violations or other egregious behavior by the spectrum lessees about which the licensee had knowledge or should have knowledge."[15] CTIA believes that in the first instance, the Commission must look to the lessee as the accountable party but recognizes the balance the Commission seeks to strike in such circumstances.

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[14] *See Second Report and Order*, 19 FCC Rcd 17563-64.

[15] *Id.* at 17564.

III. Conclusion

For the reasons discussed above, the Commission should clarify means to ensure that the private commons model affords non-participating licensees sufficient interference protection and should reject the proposal to create a new licensing scheme for equipment manufacturers interested in becoming private commons managers.

Respectfully submitted,

/s/Diane J. Cornell

Michael F. Altschul
Senior Vice President, General Counsel

Diane J. Cornell
Vice President, Regulatory Policy

Paul W. Garnett
Director, Regulatory Policy

CTIA – THE WIRELESS ASSOCIATION™
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

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